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No. 83-2161

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF MONTANA, et al.,
Petitioners,
v.
BLACKFEET TRIBE OF INDIANS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

# Brief of the Blackfeet Tribe of Indians in Opposition

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## STATEMENT OF THE CASE

Since 1932, the Blackfeet Tribe in Montana has been developing its oil and gas resources on the Blackfeet Reservation as a means of achieving economic independence. Because state taxation of tribal royalty interests from oil and gas leases interferes with that purpose, the Tribe filed suit on October 27, 1978 seeking relief from state taxes and refunds of past tax payments. The suit was brought to invalidate four state taxes that are levied on the Tribe's royalty share from oil and gas production within the Blackfeet Reservation.[1/] The

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[1/] The four taxes are: Oil and Gas Net Proceeds, § 15-23-601 to 616, MCA

Tribe did not challenge the part of the taxes levied on the share of non-Indian producers, which is the larger part of the tax. At the time, the Tribe was the lessor in 125 oil and gas leases.

Prior to 1938, the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 397, was the primary authority for leasing unallotted Indian land on treaty reservations for oil and gas purposes. Leases were authorized for a period not to exceed ten years. The Act of May 29, 1924, 43 Stat 244,

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(footnote 1 continued) (Montana Code Annotated), 1979); Oil and Gas Severance Tax, § 15-36-101 to 122; Oil and Gas Conservation Tax, § 82-11-131 and the Resource Indemnity Trust Tax, § 15-38-104 to 109. The Tribe also challenged a fifth tax which was repealed in 1975 (former RCM tit. 84 ch. 220). It is relevant only for refund purposes, not the issue here.



25 U.S.C. § 398, amended the 1891 Act to extend the term of oil and gas leases for "as long as oil and gas is found in paying quantities," and to authorize state taxation of oil and gas production "on such lands." In 1938, Congress enacted a comprehensive Indian mineral leasing statute intended to govern all future Indian mining leases of tribal lands. Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. §§ 396a-396g. The statute does not mention taxation.

Most of the Tribe's leases were made after 1938 under authority of the 1938 Act. Twelve of the leases were made under authority of the 1891/1924 Acts. State taxation of the leases began in the

1930's.[2] Each of the four taxes at issue provides that the producer pay the taxes for its own share and for the share of the royalty owner. Producers deduct the share of taxes allocated to tribal royalties from royalty payments to the Tribe.

The State defended the Tribe's suit on two alternative grounds: that the 1924 Act applies to post-1938 leases, or that the sole legal incidence of the taxes is on the non-Indian producers and the Tribe is not being taxed. The U.S. District Court for the District of Montana held that the 1924 Act

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2/State taxation of Blackfeet early leases made under the 1924 Act was sustained in British-American Oil Producing Co. v. Board of Equalization, 199 U.S. 159 (1936).



authorized the state taxes in an opinion dated January 6, 1981, which granted summary judgment to petitioners. 507 F. Supp. 446 (D. Mont. 1981). App. C. The District Court did not rule on the legal incidence of the taxes.

The Tribe appealed to the Ninth Circuit Court of Appeals. At issue was: 1) as to leases made under the 1938 Act, whether the 1924 Act applies to authorize state taxation, and 2) as to leases made under the 1891/1924 Acts, whether the 1938 Act repealed the 1924 Act. The Ninth Circuit affirmed the District Court. 729 F.2d 1185 (9th Cir. 1982), App. B. The Tribe petitioned for rehearing en banc, which was granted.

The en banc decision affirmed the District Court's holding that the 1938 Act did not repeal the 1924 Act. The

Court held that the 1924 Act, including the tax authorization, remains effective for leases made prior to 1938. But for leases after 1936, the Court held that the 1924 tax authorization did not apply. 729 F.2d 1192 (9th Cir. 1984), App. A. The Court remanded the case to the district court to determine the legal incidence of the tax. If the incidence of the tax is found to be on the producer, the Ninth Circuit further directed the district court to decide whether Montana's taxes are preempted under the standards of Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended 665 F.2d 1390 (9th Cir.), cert. denied 459 U.S. 916 (1982). Petitioners seek review of the en banc decision.



## SUMMARY OF ARGUMENT

The decision of the court of appeals is correct, is consistent with decisions of this Court, and does not conflict with decisions from other circuits. Review is unwarranted, especially prior to trial on the remanded issues.

The court of appeals correctly applied the rule that state taxation of Indian activities is impermissible unless Congress expressly consents. The court's decision is consistent with the relevant acts and their purposes and policies. The taxes are also impermissible because the act relied on by the state to authorize the taxes was repealed by a later statute. Review is unwarranted for these reasons and because important issues of tax incidence and preemption must be decided

on remand before the case is ripe for review.

ARGUMENT

I. This Case Is Not Ripe For Review

The Ninth Circuit did not decide that any existing Montana tax law is invalid. Although the Court held that the 1924 tax authorization did not apply to leases made under the 1938 Act, the court did not decide the legal incidence of the taxes. That issue was remanded to the district court for determination. In addition, if the legal incidence of the taxes is determined to be on the producer, the court directed the district court to decide whether the tax is preempted under the standards of Crow Tribe v. Montana, supra. Until the issues on remand are decided, this case is not



ripe for review by this Court.

Montana argues that this case should be decided now because there are a number of cases pending before state courts and administrative agencies involving producers who have paid taxes under protest as a result of the present case. However, a decision at this time may not provide further guidance in those cases, and would not provide the basis to finally resolve the cases. Moreover, the $5 million that Montana says has been paid under protest includes taxes paid on the producers' interest as well as the royalty interest. State taxation of the producers' interest is not an issue in this case, and would remain unaffected by a decision by this Court.

Montana also states that the outcome

of this case could substantially affect several cases pending in New Mexico and Arizona. However, the primary issue in those cases is the validity of state taxation of the producers' interest from mineral production on tribal lands. Most of the $25 million which Montana says is at issue in the cases involves taxes on the producers' interest and not the tribes' royalty interests. A decision by this Court would not affect the primary issue in those cases.

## II. The Ninth Circuit's Decision Is Correct

A. The 1924 amendment to the 1891 mineral leasing statute authorizes state taxation of mineral production "on such lands." The position of the Tribe and of the Interior Department upheld by the Court below is that "such lands" means



lands leased under the 1924 statute, not under the separate authority of the 1938 Act. This is a question of ordinary statutory interpretation, not one of repeal as the state argues.[3/] The court of appeals correctly held that the 1924 Act does not authorize taxation of leases made under the 1938 Act. Finding that the 1938 Act was intended to supersede prior mineral leasing statutes with its comprehensive and detailed procedures, the court declined to find that Congress "intended that a portion of one of the predecessor statutes [the 1924 Act tax consent] control a lease issued

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3/ The Tribe argued repeal as an alternative argument below, and it is argued here as an alternative basis to sustain the judgment below. See III infra. The court below held in favor of the State on the repeal issue.

under the 1938 Act." 729 F.2d at 1202.

Starting with the "well settled principle that state taxation of tribal income from activities carried on within the boundaries of the reservation is impermissible unless Congress has expressly consented to the imposition of the tax," Id. at 1194, the court found nothing in the 1938 Act or its legislative history manifesting a purpose to subject leases under the Act to taxes under the 1924 Act, and refused to "infer such a purpose from Congress' silence." Id. at 1202. The court also found that state taxation would conflict with the intent and purpose of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479, to promote "a significant increase in tribal autonomy and authority and the extension



to the tribes of 'an opportunity to take over the control of their own resources'." [Citation omitted]. Id. at 1197.

In its petition, Montana once again confuses the issue of repeal of the 1924 Act by the 1938 Act with the issue of whether the 1924 Act tax authorization applies to leases under the 1938 Act. Montana's arguments are focused only against repeal of the 1924 Act, the issue on which the State prevailed below. The Tribe's primary claim is that state taxation of post-1938 leases is precluded even if the 1924 Act continues to govern earlier leases. The court below recognized the distinction between these issues and held that the 1924 Act was not repealed and remained effective for leases made under it.

Petitioners ignore the primary issue

and argue that the court refused to apply customary rules of statutory construction relating to repeal. However, the court found that all parties conceded that Congress intended the 1938 Act to supersede the 1924 Act. Because the 1938 Act is silent about taxation, the court declined to hold that "a canon of construction will suffice to supply the deficient express manifestation of Congress's intent to permit the tax." Id. at 1202. The court's reasoning is fully consistent with the principles of law governing state taxation of Indian reservation activities. Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).

B. The court's decision is also



fully consistent with federal administrative treatment of the taxes. The only administrative opinions which address the issue in this case support the Tribe.

The first administrative opinion to consider the relationship between the 1924 and 1938 statutes held that leases made under the 1938 Act are not subject to taxation under the 1924 Act. 84 Int. Dec. 905 (1977), App. H at 267. The 1977 opinion was followed in 1979. 86 Int. Dec. 191 (1979), App. H at 316. No opinion prior to 1977 considered the question petitioners ask this Court to review, and no opinion before 1956 even mentioned the 1938 Act. 4/

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4/A 1943 opinion construed the 1924 Act to authorize taxation of leases made under that Act, relying on British-American Oil Producing Co. v.

As the only administrative decisions on point, deference should be given to the 1977 and 1979 opinions and not the earlier decisions on other issues. Zemel v. Rusk, 381 U.S. 1, 11 (1965). See, Baltimore & Ohio R. Co. v. Jackson,

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(footnote 4 continued) Board of Equalization, supra. 58 Int. Dec. 535 (1943), App. H at 232. An unpublished opinion in 1954 concluded that the Interior Department could authorize lessees to pay directly to the state taxes imposed on tribal royalty interests even though the 1924 Act provides for payment by the Secretary. Op. Sol. Int. Oct. 29, 1954 (M-36246) App. H at 248. The opinion relied on British-American and the 1943 opinion. An unpublished 1955 memorandum concluded that Montana could tax oil and gas royalties of the Ft. Peck Reservation tribes, but again it relied only on the 1943 opinion and did not refer to the 1938 Act. Memo Assoc. Sol. Int., Oct. 13, 1955 (M-36310) App. H at 258. Unpublished opinons in 1956 and 1966 addressed the repeal issue only. Memo Assoc. Sol. Int., May 15, 1956 (M-36345), App. H at 232; Letter from A.R. Anderson, Acting Secty. Int. to Marvin Sonosky, Oct. 23, 1966, reprinted at 84 Int. Dec. 914 (1977) App. H at 301.



353 U.S. 325, 330-31 (1957).[5/]

C. Petitioners argue that the court of appeals misconstrued and misapplied the policy of the 1934 Indian Reorganization Act, supra. However, petitioners misunderstand the court's analysis. The court of appeals did not hold, as petitioners suggest, that the IRA ended state taxes authorized by the 1924 Act. Pet. 47. Instead the court only looked to the IRA to assist it in interpreting the 1938 Act, because the

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5/ Petitioners reliance on "long-time administrative practice and common understanding," Pet. 21, ignores the factual realities of the case. The issue here was not immediately raised after passage of the 1938 Act because leases existing at the time had been made under the 1891 statute. Until leases under the 1938 were entered into and began producing, no taxation issue would arise. Thus the forty year period cited by petitioners is greatly overstated.

court had determined that the 1938 Act was meant to bring Indian mineral leasing into harmony with the IRA. 729 F.2d supra at 1198. It found that the IRA was intended to promote tribal autonomy and tribal control of natural resources, and that these policies are more consistent with royalty tax exemption. The court therefore concluded that the purposes of the 1938 Act, which reflected the policies of the IRA, would not be furthered by incorporation of the 1924 Act, and its tax consent provision. Id. at 1203. This interpretation is fully consistent with the 1934 and 1938 Acts and their legislative histories. See, S. Rep. No. 985, 75th Cong. 1st Sess. 3 (1937); H.R. Rep. No. 1872, 75th Cong. 3d Sess. 3 (1938).



The court's analysis of the IRA does not conflict with decisions of other courts. The cases from the Eighth and Tenth Circuits cited by petitioners are cases involving repeal of statutes. Nebraska Public Power Dist. v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956 (8th Cir. 1983); Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982). Here, the court of appeals expressly found no repeal of the 1924 Act, so there is no conflict with the cases from other circuits.

Nor does the Ninth Circuit's decision conflict with decisions of this Court. Neither Escondido Mutual Water Co. et al. v. LaJolla Band of Mission Indians et al., 104 S. Ct. (1984) nor Rice v. Rehner, 103 S.Ct. U.S. (1983), even mentions the Indian Reorganization

Act nor has anything to do with mineral leasing. Indeed, this Court has frequently looked to the IRA and its policies in striking down state regulation of Indian activities within reservations. See, New Mexico v. Mescalero Apache Tribe, 103 S.Ct., (1983); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832(1982); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Moe v. Confederated Salish and Kootenai Tribes, supra.

Petitioners contend that decisions of this Court "suggest" that the 1924 Act tax consent applies to 1938 leases, Pet. 23-27, but the opinions cited make no such suggestion. In McClanahan v. Arizona Tax Commission, 411 U.S. 164



(1973), the Court cited the 1924 Act, along with other acts, as an example of express congressional authorization of state taxation. Id. at 177 n. 16. The example is valid, but its citation says nothing about the issue here--whether the 1924 Act tax consent applies to leases under 1938 Act. In Merrion v. Jicarilla Apache Tribe, supra, the issue of the relationship between the 1927 Indian Mineral Leasing Act[6/] and the 1938 Act was specifically not decided by the courts below and was not an issue in this Court. The Court's statemen' that "the mere existence of

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[6/] Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398a. The 1927 Act is similar to the 1924 Act but applies only to executive order reservations. The Act has a similar tax consent provision.

state authority to tax does not deprive the Indian Tribe of authority to tax," 455 U.S. at 151, refers to taxation of the producers' interest and says nothing about whether authority exists to tax tribal royalties under leases made under the 1938 Act. Neither case addresses the issue here, nor is any suggestion made about the 1924 Act's applicability to post-1938 leases.

D. Petitioners argue that in recent legislation and legislative proposals, Congress has indicated that the 1924 Act tax consent is still in effect for leases made under the 1938 Act. Neither the statute nor the legislative proposal cited by petitioners support their statement. The Indian Mineral Development Act of



1982, 96 Stat. 1938, 25 U.S.C. § 2101-2108, provides that agreements under the Act "shall not be subject to the 1938 Act, or to any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe." 25 U.S.C. § 2105. The provision has no bearing on how the 1924 Act relates to leases under the 1938 Act. The legislative proposal to limit state severance taxes likewise has no bearing on the issue here. The proposal applies to coal mined on Indian lands, but no distinction is made between taxation of the producer's interest and tribal royalty interests. Certainly no mention is made of the 1924 Act and whether it authorizes the application

of state severance taxes to tribal royalty interests.

### III. The 1924 Act Tax Consent Does Not Authorize The Taxes At Issue Because It Was Repealed By the 1938 Act

Section 7 of the 1938 Act expressly repealed "all Act (sic) or parts of Acts inconsistent herewith." The court of appeals held that the 1924 Act was not repealed and remained effective for leases of indefinite term which were authorized by the 1924 Act and other earlier statutes. The court was concerned about the uncertainty of the legal status of such leases if it held that the earlier statutes were repealed. 729 F.2d supra at 1200. However, the court's concern is not a sufficient basis to find that the 1924



Act was not repealed.[7]

The existence of an express repealer such as Section 7 has been found to be a factor favoring a finding of repeal by implication. Andrus v. Glover Construction Co., 446 U.S. 608, 617-19 (1980). Even though there is no express repeal of the 1924 tax consent, it does substantially conflict with the policies of the 1938 Act and the Indian Reorganization Act. The 1938 Act was meant to bring uniformity to the area of Indian mineral leasing. H.R. Rep. No. 1872, supra; S. Rep. No. 985, supra. The continuing existence of

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[7] It is not necessary to find that the entire Act was repealed. The 1924 Act can continue to sustain leases made under it, even if the tax consent provision is repealed.

the tax authorization conflicts with this purpose. It also conflicts with the purposes of the IRA to promote tribal independence and economic power. See, 78 Cong. Rec. 11126-27 and 11173 (1934). State taxation of tribal oil and gas royalties has the effect of discouraging economic development.

In Plains Elec. Gen. & Tr. Co-op., Inc. v. Pueblo of Laguna, 542 F. 2d 1375 (9th Cir. 1976), a 1926 condemnation statute was held to have been repealed by a 1976 statute that made the 1948 Indian Rights of Act, 62 Stat. 17, 25 U.S.C. §§ 323-328, applicable to Pueblo tribes. The 1948 Act was meant to bring uniformity to the granting of rights of way across Indian lands and to implement the policies of the IRA. The Court held



that the policies of the 1948 Act and the IRA "would be nullified by the continued validity" of the 1926 Act. Id. at 1380-81. Thus, repeal is supported by case law, and is not foreclosed by any canons of construction cited by petitioners. See, Andrus v. Glover, supra.

The administrative opinions which found no repeal, cited earlier at 15-16, did not consider the issue in light of the purposes and policies of the 1938 Act and the IRA. Nor had Andrus v. Glover, supra, and Plains Electric been decided. Therefore, the opinions are of limited value.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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